



DATE: July 21, 1998  
CASE NO. 98-JSA-2

U.S. DEPARTMENT OF LABOR,  
Complainant,

v.

MGA, INC.  
Respondent.

BEFORE: THOMAS F. PHALEN, JR.  
Administrative Law Judge

### **DECISION AND ORDER**

This dispute is brought under the provisions of the Wagner-Peyser Act of 1933, as amended, 29 U.S.C. 49, *et seq.*, and the regulations thereunder at 20 C.F.R. Part 658, Subpart E.

#### **Procedure and Background Information:**

On September 11, 1996, Francois Goellner filed a complaint with the United States Department of Labor ("Complainant") against his former employer, MGA, Inc. ("Respondent") for failing to pay him his last six weeks of wages. Mr. Goellner is a non-immigrant computer professional from France. His profession qualified as a specialty occupation and he was certified as eligible for H-1B status by Employment Training Administration ("ETA") and INS. Respondent employed Mr. Goellner and hired him out as a consultant to Euronet Computer , Services, a division of Rail Europe Group, Inc., in White Plains, New York, which is within commuting distance of Stamford, Connecticut. Complainant's H-1B investigations substantiated the complaint and exposed the following violations.

1. Respondent misrepresented a material fact on the Labor Condition Application ("LCA") and failed to provide precise and specific information on the LCA. Respondent paid Mr. Goellner less than indicated on the LCA. Respondent also checked that Mr. Goellner was a part-time employee when he, in fact, worked as a full-time employee.
2. Respondent failed to meet a condition in the LCA by willfully failing to pay the required wage to an H-1B non-immigrant. Respondent failed to pay Mr. Goellner for his last six weeks of work. Respondent failed to pay Mr. Goellner the \$25.00 hourly rate specified in the LCA.

3. Respondent failed to develop the necessary actual or prevailing wage documentation. Mr. Goellner was hired as a system designer/programmer. Respondent arrived at the \$25.00 per hour salary as an estimated average paid to similarly qualified computer professionals with similar experience and education. Respondent did not make an attempt to determine Mr. Goellner's actual wage rate or prevailing wage rate.
4. Respondent failed to maintain a public access file and documentation at the principal place of business.
5. Respondent failed to maintain employee and payroll records as required.
6. Respondent discriminated against Mr. Goellner in the form of retaliation for pursuing his DOL complaint.

Pursuant to 20 C.F.R. § 655.731(d)(1), the Wage and Hour Division submitted a request to ETA to determine the appropriate prevailing wage for Mr. Goellner. Based on Mr. Goellner's qualifications and experience, ETA determined that the prevailing wage in the area of intended employment for a system designer/programmer is \$49,577 per year. On January 29, 1997, Complainant informed Respondent that their documentation of the prevailing wage for Mr. Goellner as a system designer/programmer failed to conform with the regulatory criteria at 20 C.F.R. § 655.731(b)(3) and/or 20 C.F.R. § 655.731(a)(2).

On February 4, 1997, Respondent appealed ETA's determination through the Employment Service Complaint system. *See* 20 C.F.R. Part 658, Subpart E. Respondent argued that Mr. Goellner was not entitled to the prevailing wage rate because he misrepresented himself on his resume.

Complainant informed Respondent on March 28, 1997, that their letter did not properly constitute a prevailing wage challenge. Complainant instructed that a proper prevailing wage rate challenge must include documentation that the prevailing wage determination provided is in error and that the employee's wages equaled or exceeded the correct prevailing wage rate.

Respondent explained in a letter dated April 4, 1997, that they do not have any experience in what properly constitutes a "prevailing wage challenge." They explained that there are no general standards in the computer industry for determining salaries. Rather, companies determine salary limits for specific positions. Rail Europe, for whom Mr. Goellner acted as a consultant from MGA, established the rate for a trainee or Junior Programmer with one to one and a half years of general experience at \$30,000 to \$35,000 per year. Respondent also obtained a copy of a National Salary Survey for 1997 created by Source EDP, the largest MIS placement service. The National Salary Survey indicated that the annual salary for a "Junior Programmer" is \$30,000 to \$35,000. Respondent paid Mr. Goellner \$41,600 per annum in 1995 with a subsequent increase to \$45,760 in 1996.

On June 27, 1997, Complainant acknowledged Respondent's attempt to substitute the National Salary Survey for the Connecticut DOL (SESA) Wage Survey. Respondent, however, failed to provide information about the survey for Complainant to make a determination that it meets the criteria for a valid survey under 20 C.F.R. § 656.40. Therefore, Complainant requested information about the "purpose of the survey, the sample came for the survey (size and source), information about sample selection procedures and distribution (random, stratified etc.), the coverage of the sample (industry or industries covered, firm size, etc.) a copy of the survey instrument if possible, and a copy of the full published results of the survey."

Respondent replied on July 1, 1997, to Complainant's request for information about the National Salary Survey. Respondent reiterated that they sent an independent salary survey conducted by Source EDP for every category of Computer expertise, broken down by titles, years of experience, etc. . . . for every state and county in the United States. Respondent objected to the request for additional information about the survey. "You asked us for proof and we gave you proof You cannot, in all fairness, come back to us at every step of the way and require more proof to prove the previous proof I am sure that you will agree with us that there are laws which forbid this kind of harassment."

Complainant had no choice but to agree with ETA's prevailing wage determination of \$49,577 per year for Mr. Goellner's position. On August 5, 1997, Complainant informed Respondent of its decision because the National Salary Survey was too broad for a prevailing wage determination and Respondent failed to provide information to prove that the survey met with the regulations at 20 C.F.R. 656.40.

On August 18, 1997, Respondent requested a formal hearing before an Administrative Law Judge pursuant to 20 C.F.R. § 658.421(d). The claim was transferred to the Office of Administrative Law Judges on January 2, 1998. On March 16, 1998, Respondent replied to the undersigned's request for a memorandum regarding the parties' positions. Respondent alleged that Mr. Goellner misrepresented his level of education and experience and, therefore, was only entitled to \$44,000 per year instead of the prevailing wage rate as determined by ETA. Complainant submitted a brief wherein they argued that the Connecticut DOL (SESA) made a proper wage determination and urged this Court to affirm it as the prevailing wage rate for Mr. Goellner.

#### Discussion:

The only issue before the undersigned is whether the prevailing wage determination used by Connecticut DOL and ETA is appropriate. This requires an analysis of the underlying regulations.

Since this claim is not covered by the Davis-Bacon Act or the McNamara-O'Hara Service Contract Act, the "prevailing wage rate" is determined pursuant to 20 C.F.R. § 656.40(a)(2)(i), which states:

The average rate of wages, that is, the rate of wages to be determined, to the extent feasible, by adding the wage paid to workers similarly employed in the area of intended employment and dividing the total by the number of such workers. Since it is not always feasible to determine such an average rate of wages with exact precision, the wage set forth in the application shall be considered as meeting the prevailing wage standard if it is within 5 percent of the average rate of wages.

“Similarly employed” is defined at 20 C.F.R. (5 656.40(b)).

. . . “[S]imilarly employed” shall mean “having substantially comparable jobs in the occupational category in the area of intended employment,” except that, if no such workers are employed by employers other than the employer application in the area of intended employment, “similarly employed” shall mean:

(1) “Having jobs requiring a substantially similar level of skills within the area of intended employment”; or

(2) If there are no substantially comparable jobs in the area of intended employment, “having substantially comparable jobs with employers outside of the area of intended employment.”

The regulations call for the prevailing wage rate to be set according to the number of workers similarly employed in the intended area of employment. The H-1B investigation determined that Mr. Goellner was employed as a system designer/programmer. Mr. Goellner acted as a consultant to Rail Europe located in White Plains, New York. Therefore, the prevailing wage rate would be what other system designers/programmers located in White Plains, New York were making at the time Respondent filed Mr. Goellner’s LCA.

Connecticut DOL and ETA determined the prevailing wage rate for the occupation and area to be \$49,577 per annum. Respondent attempted to rebut this finding by submitting information that Mr. Goellner had less education and experience than they initially were led to believe. In *Exotic Granite & Marble, Inc. v. United States Department of Labor*, 98-JSA-1 (February 12, 1998), the court determined the alien worker’s appropriate classification of employment by relying on the employer’s earlier filings and letters, “particularly its initial LCA.” *Id.* at 11. Considering *Exotic Granite & Marble, Inc.*, I give little weight to Respondent’s attempt to minimize Mr. Goellner’s education and experience level after the LCA was filed. Respondent’s LCA listed Mr. Goellner’s responsibilities as “Evaluate current software for [A]merican market and redesign program and finalize for [F]rench speaking/[E]uropean and [A]frican market.” Hence, I give the most weight to the determination of the Connecticut DOL and ETA that Mr. Goellner was a system designer/programmer.

In addition to minimizing Mr. Goellner’s education and experience, Respondent attempted to show a lower prevailing wage rate by submitting an independent survey for national salaries conducted by Source EDP. An employer seeking to employ H-1B non-immigrants in a

specialty occupation must agree to pay the required wage rate. § 655.731. The required rate is the greater of the actual wage rate or the prevailing wage rate. § 655.731(a). The actual wage is the “wage rate paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question,” § 655.731(a)(1). Respondent has not presented any information regarding other employees with similar education and experience to prove that an “actual wage rate” applied to Mr. Goellner’s position. Therefore, this claim will be analyzed under § 655.731(a)(2), which governs the “prevailing wage rate.”

“The prevailing wage for the occupational classification in the area of intended employment must be determined as of the time of filing the application.” § 655.731(a)(2). The employer must utilize one of three sources to establish the prevailing wage. *Id.* The employer may use a wage determination for the occupation and area issued under the Davis-Bacon Act or the McNamara-O’Hara Service Contract Act. § 655.731(a)(2)(i). The employer may rely on a union contract negotiated at arms length. § 655.731(a)(2)(ii). If the job opportunity is not in an occupation covered by either §§ 655.731(a)(2)(i) or (ii), then the employer shall pay the average rate of wages of workers who are similarly employed in the intended area of employment. § 655.731(a)(2)(iii). The prevailing wage rate under paragraph (a)(2)(iii) is to be based on the best information available. *Id.*

The Department lists three sources, in order of priority, as the most accurate and most reliable sources of information for prevailing wage rates. § 655.731(a)(2)(iii). The employer may request a SESA Determination within 90 days of filing a LCA and may not contest the finding except through the Employment Service Complaint system at 20 C.F.R. § 658.410. § 655.731(a)(2)(iii)(A)(1-2). The employer may utilize an independent authoritative wage source in lieu of a SESA determination, but it must meet the requirements at § 655.731(b)(3)(iii)(B). § 655.731(a)(2)(iii)(B). Finally, the employer may rely on other legitimate sources of wage data, but it must meet the requirements of § 655.731(b)(3)(iii)(B) **and** the employer is required to demonstrate the legitimacy of the wage in the event of an investigation. § 655.731(a)(2)(iii)(C).

Respondent did not use a SESA Determination on the LCA for Mr. Goellner. Rather, the parties agreed that Respondent would pay Mr. Goellner \$20.00 an hour although he was billed out to Rail Europe as a consultant at \$28.00 an hour. I find Respondent violated the regulations at § 655.731 because they did not pay Mr. Goellner the actual wage rate or the prevailing wage rate. Respondent’s attempt to contradict the ETA and Connecticut DOL finding of a prevailing wage rate is not well-taken. Respondent attempted to use an independent authoritative source/another legitimate source of wage information by submitting the National Salary Survey conducted by Source EDP. Section 655.731(b)(3)(iii)(B), however, requires that the survey be published in a “book, newspaper, periodical, loose-leaf service, newsletter, or other similar medium, within the 24-month period immediately preceding the filing of the employer’s application.” The survey must also:

1. Reflect the average wage paid to workers similarly employed in the area of intended employment;

2. Be based upon recently collected data--e.g., within the 24-month period immediately preceding the date of publication of the survey; and
3. Represent the latest prevailing wage finding by the independent authoritative source for the occupation in the area of intended employment.

§ 655.731(b)(3)(i)(B)(1)-(3).

Respondent merely submitted one page of a "Local Salary Survey" with a 1997 copyright date. The regulations require the prevailing wage rate be determined at the time the LCA is filed. Since the LCA was filed in 1994, I find Respondent's National Salary Survey for 1997 inappropriate. Furthermore, Respondent did not submit the information necessary for ETA to determine if it met the criteria at §§ 655.731(b)(3)(i)(B)-(C)(1)-(3). As a result, Mr. Goellner should have been paid the prevailing wage rate, as determined by ETA and Connecticut DOL, of \$49,577.<sup>1</sup>

### **ORDER**

IT IS HEREBY ORDERED that Respondent shall pay Mr. Goelmer \$5,720.42 for the six weeks he was not paid. Respondent is also ordered to pay the difference between the prevailing wage rate of \$49,577 per year and the wages Mr. Goelmer was paid of \$41,600 per year from October 1995 to March 1996, which is approximately 21 weeks at \$153.00 per week for a total of \$3,221.48.

THOMAS F. PHALEN, JR.  
Administrative Law Judge

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<sup>1</sup> Respondent's protest concerning the equities and the details of the process under 20 C.F.R. Part 658, Subpart E, as set forth in its letter of July 1, 1997 is not well taken. It chose to invoke the benefits of the H-1B program and is charged with leaving the details of that program however burdensome. Employee hired pursuant to the program are entitled to all of the protections of the program as are other workers who are not in the program, but whose jobs the provisions were meant to protect.